



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

Issued by the Department of Transportation on March 19, 2004

NOTICE OF ACTION TAKEN -- DOCKETS OST-2003-15021 & 2002-12550

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Application of **American Airlines, Inc.** filed **2/17/04** for:

XX Contingent waiver from the 90-day dormancy condition:

BACKGROUND

By Notice of Action Taken dated July 30, 2002 (Docket OST-2002-12550) the Department authorized American Airlines to provide third-country code-share service to Ukraine with Swiss International Air Lines, Ltd. d/b/a Swiss, via Zurich and awarded it 2.5 weekly frequencies to operate in the U.S.-Ukraine market. American and Swiss implemented the service; however, on August 1, 2003, Swiss filed a notice in Docket OST-2002-12001 that it would cease serving Ukraine effective October 26, 2003.

On October 30, 2003, United filed an application for the available U.S.-Ukraine third-country code-share opportunity and requested 3.5 frequencies (Docket OST-2003-16445).

On October 31, 2003, American filed to transfer its U.S.-Ukraine third-country designation and 2.5 weekly frequencies from Swiss to British Airways. Even though it had not been using these frequencies, American is proceeding on the basis that it still holds them through March 31 by virtue of a blanket dormancy waiver granted to U.S. carriers in Order 2003-4-18. On the contingency that American's request to transfer these frequencies to British Airways is not granted in time for service to begin by April 1, American requests a waiver of the 90-day dormancy condition until such time as the Department grants American's transfer application and American has implemented U.S.-Ukraine service with British Airways.

United filed an answer urging the Department to dismiss American's application and approve United's application stating that the frequency allocation to which American refers was limited to code-share services in conjunction with Swiss, and those services ceased on October 26, 2003. In this regard, United states that American is no longer in a position to restart those services.

Applicant rep.: **Carl B. Nelson, Jr., 202-496-5647** DOT analyst: **Sylvia Moore, 202-366-6519**

DISPOSITION

XX **Dismissed** (see Remarks)

The above action was effective when taken: **March 19, 2004**

XX Action taken by: **Paul L. Gretch, Director**
Office of International Aviation

Remarks: When American applied for the code-share frequencies before us here, it expressly agreed that it “will immediately return any unused frequencies for reallocation upon application by another U.S. carrier requiring such frequencies to operate additional Ukraine service.”¹ We have now received such an application from United, in Docket OST-2003-16445. Even had American not committed to returning these frequencies in the circumstances presented, we would still reach the same result under established policies that when we award authority to a specific U.S. carrier-foreign carrier code-share partnership to serve a designation-restricted or frequency-restricted market, the U.S. carrier cannot freely change code-share partners without first seeking Department approval and, in the event of competing U.S. carrier interest, recompeting for the authority in a new selection proceeding.² On this basis, and notwithstanding the dormancy waiver cited by American in Order 2003-4-18, we conclude that American has now lost its claim to the 2.5 Ukraine frequencies, and those frequencies have reverted to the Department for reallocation. Since a dormancy waiver can only operate to maintain frequencies that a carrier in fact still holds, and since we have determined that those frequencies have reverted to the Department for reallocation based on American’s prior statements, and its partner’s notification of cessation of service, and the effect of our established policies, American’s reliance on Order 2003-4-18 is misplaced. Consequently, American’s contingency dormancy motion is moot and we are dismissing it. By separate concurrent action, we are issuing a Notice in connection with the launching of a competitive selection proceeding for the available Ukraine service.³

Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that our action was consistent with Department policy and with the public interest. We may amend, modify, or revoke the authority granted in this Notice at any time without hearing at our discretion.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department’s regulations, 14 CFR §385.30, may file their petitions within seven (7) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

*An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/reports_aviation.asp*

¹ Reply of American of July 9, 2002, in Docket OST-2002-12550, at 2. (Footnote omitted).

² See Order 2000-10-14. Cf. Order 2002-3-24.

³ We have consolidated American’s application in Docket OST-2002-12550 for transfer of its U.S.-Ukraine third-country code-share designation and frequencies and United’s application in Docket OST-2003-16445 in this new proceeding, Docket OST-2004-17373.